LashaTsertsvadze*

Directorate (director) Obligations on Merging of Companies and Acquiring Control Packet

(Comparative Law Analysis)

1. Introduction

Directorate duties in the company management are immeasurable, especially its responsibilities in important operations such as reorganization of an enterprise, i.e. transformation, merging and partition. Alienation of the controlling stock is a transaction of no less importance. The Georgian juristic literature concerning these issues is very scanty, so it can be concluded that this sphere is not properly studied.[1]

Decisions connected with the reorganization of the enterprise can be made because of different reasons. For example enterprises can be merged in order to operate more effectively and successfully in competitive environment on market or considering business objects one legal form might be transformed into the other legal form and etc. In this process according to the American corporate law the directorate *(Board of Directors)*plays a crucial role, which can't be said about the Georgian legislation.

According to the law about entrepreneurs the decision connected with reorganization is made by partners (stockholders). The law does not state special involvement or responsibility standard of the directorate in this process, while the American legislation and court practice are very rich from this point of view.

On one of the famous cases *Smith vs. Van Gorkom*[2] Court of Appeals of Delaware explained that the *fiduciary* duties of directors in relation to the enterprise comprise *Duty of Care* and *Duty of Loyalty*[3]. There are no similar unique indications and segregation of duties in Georgian legislation.

Considering the article format it does not concern tax legislation issues accompanying a merging process of enterprises because of a simple reason that its volume does not give such opportunity. Here it must be noted that the discussion of this issue in the aspect of tax legislation is very important and in the future it might become a subject of an individual article.

---

* Doctoral Student, TSU Faculty of Law

1 Juristic literature about the issue to be discussed after making changes in 2008 to the law "About Entrepreneurs" is rather difficult. This fact is emphasizing that this question has not been studied so far and consequently it is very important to discuss it in the context of the work.

2 Supreme Court of Delaware*, Smith v Van Gorkom,488A.2d 858 Delaware1985*. <http://international. westlaw. com/find/default.wl?sp=intbucrs000&rp=%2ffind%2fdefault.wl&sv= Split&rs =WLIN11.04&cite= 488A.2d+858+&fn=_top&mt=314&vr=2.0&findjuris=00001>

3 *Welch E. P,Turezyn A. J.*, Folk on the Delaware General Corporation Law, Fundaments, 2005 Ed. "Aspen Publisher" 2005, 82.

As the revival of principles of law is done by courts, in the article there will be used court practice, giving more practical purpose to it.

In connection with the issue to be studied there is scantiness of Georgian scientific literature and court practice. Therefore studying comparative law on the basis of court practice and doctrine for the legislation of such a young and inexperienced country, as Georgia, is especially important.

Duties of the directorate in the reorganization process of the enterprise will be discussed on the example of a joint-stock and limited liabilities companies, as they represent classical type of capital enterprises, where the directorate's duties and functions are most distinctly revealed.

The present article concerns one of the reorganization forms, merging of enterprises and the involvement of directors in this process, alienation of controlling stock and using of defensive measures. In spite of this the article can't be perfect without a short description of reorganization forms of enterprises, specifically merging.

Considering the article format all the forms of reorganization can't be discussed perfectly, so as it is seen from the title in this work more widely are discussed comparatively problematic issues connected with merging of companies and acquisition.

Corporation, as an entity of private law is a practical realization of one of the basic constitutional right - the right of amalgamation of persons with a purpose of getting material profit.[4]Interests of the members (stockholders, partners) and leaders of this corporation do not always have the same interests.

The main duty of the director is to runhis/her enterprise honestly. The guidance of the enterprise means reasonable creation of competent management, which will form the enterprise policy and is a high ring of leadership[5].

Accordingly the directorate is obliged to find golden mean and run the enterprise without causing any harm to interests of their stockholders, persons engaged in the enterprise and their own interests, which is a rather hard task.

Taking into account the above mentioned idea the aim of the present article is to become a modest adviser to directors, lawyers, attorneys and judges of the companies acting in Georgia, as their viability is provided by a practical assignment.

2. Enterprise Transformation Forms according to the Georgian Law about Entrepreneurs

2.1. Enterprise Transformation (Change of a Legal Form)

On setting up an enterprise its organizational-legal form is chosen considering a number of factors, though the modern market economics is developing dynamically and after passing some time a form of a certain business chosen by the founders in the past might not answer modern business

[4] *Schramm H.,(Schramm H.,-Joachim)*Control of society organizations by the state *(Die Kontrolle der Geselschaftsorgane durch der Staat)*. Honest guidance duties and responsibilty in joint-stock companies according to Georgian and German law, symposium materials, II German-Georgian symposium in Corporation Law, Tb., 2003, 167(In Georgian).

[5] *Qoqrashvili Q.,*Entrepreneurship Law, Tb.**,** 2005, 103 (In Georgian).

demands. Just for this reason on the basis of the principle of a private autonomy of entities of civil law entrepreneurs can choose an enterprise form freely not only on founding the organization, but also during activities and change the chosen form for another one.[6]

According to paragraph 14^{4}.2of law about entrepreneurs partners can transform an enterprise of one legal form into an enterprise of the other legal form. As entrepreneurial societies, as well as individual entrepreneurs have the opportunity of transformation, as the law does not give any any kind of restriction from this point. In case of transformation partners are making decision about redistribution of their functions and duties in the transformed enterprise, but they must take into account restrictions imposed by the law about entrepreneurs to a legal person resulted from the transformation. M

As it is seen from the law about entrepreneurs in order to transform the Ltd into the joint-stock (JSC) or vice versa it is necessary to have a decision adopted by 75 % (in case of joint-stock company 75%+1) of the attended partners who have the right of voting but in all the other cases the decision is adopted unanimously.[7]This rule is ambiguous and it needs to be explained, namely it is interesting what is meant under "the attended partner (partners) who has the right of voting". For example, if the partners meeting are attended by 45% partners who have the right of voting and they support the transformation of Ltd into JSC, will the decision be counted as adopted? But according to the law legitimate is the decision made by 75% of the attended partners who have the right of voting, then in our concrete case it turns out that the decision was supported by 100% of the attended partners who have the right of voting.

According to paragraph 9^{1}.2 of the law about entrepreneurs "The meeting is capable to make decision, if it is attended by a partner (partners) who has the majority of votes. The meeting adopts the decision by the majority of votes". According to paragraph "k" of part 5 of the same article the decision connected with the reorganization and liquidation of the enterprise is made by the partners meeting. This standard of the law answers the question. The decision made by a partner (s) having 45% votes can't be consistent with the law, as the law about entrepreneurs envisages having a quorum and the meeting will be capable to make decision, if it is attended by the partners having the majority of votes and in usual cases the meeting adopts the decision by the majority of the attended votes.

In connection with the transformation of Ltd the meeting must be attended by all the partners (partner) having the right of voting and 75% from attendees must support the transformation of Ltd into JSC, so that the decision will be legal. As for the transformation of JSC into Ltd it is necessary assent of more than 75% votes of partners having the right to presence.[8]

According to the law about entrepreneurs the transformation of Ltd into the joint-stock (JSC) or vice versa is simplified and the analogous decision requires 75%[9]votes of partner (partners) having the right to presence. (In case of joint-stock company as we mentioned it is necessary to have 75%+1 votes of partner (partners) present and voting) though it is possible that adoption of such a decision

---

6 *Chanturia L., Ninidze T.,*Commentary to the Law about Entrepreneurs, III Ed., Tb., 2002, 185(In Georgian).
7 "About Entrepreneurs" Georgian law, Article14^{4}.3(In Georgian).
8 "About Entrepreneurs" Georgian law, Article 54.6<b>,54.7(In Georgian).
9 "About Entrepreneurs" Georgian law, Article, 14^{4}.3 (In Georgian).

might be regulated in a different way. "If it is not stated otherwise by the regulations, this part of the law can be explained in two ways:

The first: in connection with the adoption of the analogous decision the regulations might consider higher standard, a legislator sets a minimal requirement which must be satisfied by all means, if the decision about the transformation is not supported by 75% partners having the right to presence, this decision won't be legitimate, even if the lower standard is considered by the regulations.

And the second: the above mentioned rule of the law can be understood in the following way, that if the regulations do not say anything in connection with the reorganization, then there will be used rules of the law according which: The meeting must be attended by all the partners (Georgian Law "on Entrepreneurs", article $9^{1}7$), the meeting will make decision by the 75% of the votes of all presented partners who have the right of presence (In case of JSC 75%+1). It is possible to change by the regulation of the company, the standard set by the law, either increase or decrease it.In case of decrease of the standard set by the law, it is logical that it will not be considered legitimate if it will be set to lower then to 50%+1 votes, just because one simple reason, that generally the law on Entrepreneur while carrying out common duties considers the meeting legitimate if there are 50%+1 partners having the voting rights present.

It should be said undoubtedly, that it is essential to determine the lower boundary. Even such a well-known liberal Corporate law of the Delaware State,sets the importance of having the lower boundary, in particular it may take into account setting of the lower boundary of votes than the one of the simple majority, (Quorum) however it cannot be lower than 1/3 of the votes.

In discussing a concrete case it is important how the court explains the above mentioned rule. Considering the principles of fairness, protection of partners and creditors of the enterprise the second explanation is more accessible, as the adoption of the decision even by 50%+1 of attendees won't be able to protect the partner properly in the reorganization process.

"In all the other cases the decision connected to the reorganization must be adopted unanimously"[10]. Decision about the transformation of a commandite company and joint liability group into capital societies must be adopted by all 100% owning partner (partners) unanimously. If even one partner is against the transformation, the decision will not be adopted.[11]

Setting a lower standard for Ltd and LSC by the law is due to the fact that these two legal organizational forms have more or less similar rights and duties. Both of them are societies of capital type and such transformation does not need any significant organizational change. Moreover the law about entrepreneurs states that the transformation of Ltd into JSC and vice versa is not assumed as the ability decrease of creditors satisfaction[12]and in such a case creditors are not entitled to ask the enterprise for fulfillment the charged obligations ahead of time.

As for legal persons (e.g. commercial banks) acting on the basis of a special license in case of their reorganization it is necessary to have the assent of the organization issuing the license (National Bank).[13]

---

[10] "About Entrepreneurs" Georgian law, Article 14^{4}.3 (In Georgian).

[11] *Chanturia L., Ninidze T.,*Commentary to the Law about Entrepreneurs, III Ed., Tb., 2002, 187.

[12] "About Entrepreneurs" Georgian law, Article 14^{4}.6(In Georgian).

[13] Organic law "About National Bank", Article 2 (g), law"About Activities of Commercial Banks", Article1<z, k>(In Georgian).

2.2. Merging (Consolidation, Joining)

Merging of companies in market economics conditions might be of vital importance for them. In strong competition conditions the only chance of surviving for a company is often consolidation or joining with other company. The stronger competition is, the less is chance of surviving of small companies and accordingly the opportunity of merging of companies is increasing.[14]

Merging of enterprises is an absolutely natural event in enterprises activities. Just for this reason the law admits the opportunity of merging of enterprises; as in case of the reorganization of the enterprise the law here also states a minimal standard for adoption of the decision about merging and gives the entrepreneur entities the opportunity of setting a higher standard by means of the regulations. For the adoption of the decision about merging of Ltd and a cooperative it is necessary to have 75% votes of the presenting partner (partners) having the right of voting, in case of a JSC to have more than 75% votes of the presenting partner (partners) having the right of voting. In all the other cases the decision is adopted unanimously.[15] (For details connected with these questions see in the above mentioned work[16])

According to the law about entrepreneurs in the decision about merging it should be noted whether one enterprise is joining the other enterprise (joining) or two enterprises are uniting into one enterprise (amalgamation). Despite such formulation of the law text it should be definitely remarked that it is possible joining as well as amalgamation of more than two enterprises[17]and accordingly the text of the law must not be understood in such a way as if it bans joining or amalgamation of two or more enterprises.

As it was seen merging can be carried out by joining or amalgamation. Itis interesting what the difference between them is. Amalgamation is meant when two or more enterprises are united to form one enterprise, joining is meant when one or several enterprises are joined to the other already existed enterprise.[18]Merging of enterprises is carried out by concluding an agreement on merging between the enterprises to be joined, which is signed by managers of these enterprises, in case of Ltd and JSC – by their directors, after the decision has been adopted by the partners in accordance with the legislation connected with it. Of course directors' duties in relation to the enterprise will not only be confined to signing the agreement, the directorate has the biggest role and responsibility in this process that will be discussed below.

Partners' rights and duties must be defined in the decision about merging. If in the agreement about merging nothing is said about partners' rights and duties, this issue will be regulated according to the law about entrepreneurs and in the capital there will be considered the proportionality coefficient of their shares, i.e. their rights and duties will be redistributed according to their shares in the capital.

---

14 *Chanturia L., Ninidze T.,*Commentary to the Law about Entrepreneurs, III Ed., Tb.,2002, 193(In Georgian).

15 "About Entrepreneurs" Georgian law, Article 144.4(In Georgian).

16 See subchapter 2.1.

17 *DjugeliG., Nadaraia L,*Reorganization Forms of Enterprises according to the Law "About Entrepreneurs" , Bar Association Journal of Georgia, "Profession Lawyer" #2, 2007, 36-56(In Georgian).

18 *DjugeliG., Nadaraia L***,** Reorganization Forms of Enterprises according to the Law "About Entrepreneurs" , Bar Association Journal of Georgia, "Profession Lawyer" #2, 2007, 36-56 (In Georgian).

2.3. Division (Split-off, Spin-off)

The common reorganization form of enterprises is division of enterprises. According to 14.[4].5 article of the law about entrepreneurs the enterprise can be divided into two or more enterprises and they can continue their activities as independent enterprises. The decision about the division might consider the former partners' share change in the capital of the entities created as a result of the division. If in the agreement there is nothing said about the share change in the capital, it will be left unchanged in new enterprise(s) created as a result of the division.

There is difference between split-off and spin-off. When the enterprise is splitting into two or more enterprises, the first enterprise stops its existence, it is liquidated. When the enterprise is spinning-off the first enterprise does not stop its existence, one or several enterprises are separating from it.[19]

Merging of enterprises can be done by dividing-joining, which means the following: the spin-off enterprise might be joined or amalgamated (merged) with the other enterprise.

As in consequence of the division the existed enterprise is liquidated, the decision about the reorganization of this form can be adopted by the majority of votes envisaged for the liquidation of enterprises.[20]

In case of Ltd and cooperatives this decision must be adopted at the meeting conducted with participation of 50%+1 partners and the decision must be counted as adopted, if it is supported by the majority of the attendees. In case of the JSC such a decision will need more than 75% votes. In all the other cases (Commandite Company and Joint Liability Company) the decision must be adopted unanimously, which means the adoption by all (100%) partners.[21]

2.4. Procedures Connected with the Reorganization

The decision about the enterprise reorganization must be registered in the register of non-productive (non-commercial) legal entities, the information about starting the reorganization process is sent to a public entity, the incomes service, included into the management sphere of the Ministry of Finance, which within 10 days from the date of receiving the information sends the registering agency the information about the tax obligations of the entity. If the registering agency does not receive the information about the tax debt of the entity within 10 days, it means that the entity does not have the tax debt. Within 10 days the incomes service sends the information about the possible debts to the registering agency and points out the deadline for the proper checking of the entity, which must not exceed 90 days from starting the reorganization of the enterprise. In case of need this deadline can be prolonged but not more than two months.[22]

---

[19] *Qoqrashvili Q.,* Entrepreneurial Law, Tb., 2005, 165(In Georgian).

[20] *Chanturia L., Ninidze T.,* Commentary to the Law about Entrepreneurs, III Ed., Tb., 2002, 199(In Georgian).

[21] The basis of this noted conclusion is the analysis of Articles 2.3, 91.2., 9.[1]5 <k>, 14.1, 14[4]5, 54.6<b>, 54.7, 63.2 of the Law about Entrepreneurs (In Georgian).

[22] "About Entrepreneurs" Georgian law, Article 14.3 (In Georgian).

If the change of a legal form does not cause the decrease of capability of the enterprise to satisfy its creditors or the 100% daughter company is joined to the enterprise, then the rules foreseen by articles 14.3-14.4 of the law "About Entrepreneurs" are not extended; but creditors will not have the right envisaged by paragraph 14.[4].8 of the law "About Entrepreneurs" to demand from the enterprise to perform obligations ahead of time.

Indebtedness of the enterprise to the state does not cause automaticsuspension of registration. The law "About Entrepreneurs" states exceptions, namely: if it is required to reorganize the enterprise created by more than 50% share participation or in consequence of the reorganization the capability of the creditors satisfaction is not decreasing, or there is a consent of the Ministry of Finance to reorganization of the enterprise which has debts.[23]

Considering the above mentioned situation, if the enterprise has indebtedness to the budget, the directorate has to apply the Ministry of Finance and get consent from it in order to avoid the further sanctions, because whether the creditors' satisfaction ability is decreasing or not as a result of the reorganization of the enterprise might become a disputable issue. Transformation of Ltd into JSC or vice versa is not counted as the decrease of the creditors' satisfaction ability.[24]Accordingly the directorate must receive the consent from the Ministry of Finance in all the other cases.

The executive organs participating in the reorganization are obliged to carry out the above mentioned actions. The law does not point out directly in connection with it, but it is clear that the decision adopted by the company's partners must be performed and controlled by the directorate and supervising authority (if any).

2.5. Protection of Creditors during the Reorganization Process

Protection of creditors during the reorganization process is an important issue, because in such a case creditor's legal status is changing. On reorganization the original debtor is often nullified and consequently on the reliability of a new debtor, as a rule, the creditor has no information. As a result of the property redistribution after the reorganization the property status of the enterprise might be worsened, that significantly decreases the chance of the creditor's satisfaction.[25]It's true that in case of the enterprise transformation the debtor as a subject is not changed, but the debtor's legal status is changed, which might be a danger to the creditors.[26]Just for this reason the law about entrepreneurs includes standards for protection of creditors in the process of reorganization.

With the request for registration of starting the reorganization process of the enterprise it is necessary to submit to the registration body the information about the enterprise's creditors and

[23] "About Entrepreneurs" Georgian Law, Article 14[4].7(In Georgian).

[24] "About Entrepreneurs" Georgian Law, Article 14[4].6, last sentence(In Georgian).

[25] *DjugeliG., Nadaraia L.,*Reorganization Forms of Enterprises according to the Law "About Entrepreneurs" , Bar Association Journal of Georgia, "Profession Lawyer" #2, 2007, 36-56(In Georgian).

[26] *DjugeliG., Nadaraia L.,*Reorganization Forms of Enterprises according to the law "About Entrepreneurs" , Bar Association Journal of Georgia, "Profession Lawyer" #2, 2007, 36-56(In Georgian).

indicate terms of their satisfaction. The information about starting the reorganization must also be sent to all the known creditors, indicating the terms of their satisfactions.[27]

The law about entrepreneurs gives a creditor the right to demand fulfillment of obligations ahead of time, if the creditor finds out that the reorganization of the enterprise is being planned, in their turn guiding bodies of the enterprise are obliged to provide all the known creditors with the information about the reorganization.

Article 102 (b) (7) of corporation law of Delaware envisages limited liability of the director in case of violation of the duty of care if in the company's regulations there is a note about the limitation on the director's responsibility.[28]There is no analogous note in corporation law of Georgia, on the contrary such consent between the directorate (supervising authority) and the enterprise is annulled by the law about entrepreneurs, when in order to satisfy the creditors it is necessary reimbursement of the damage inflicted on the enterprise by director or any member of the supervising body. The leaders' responsibility is not ceased even when they are acting to perform the partners' decision..[29]

In order to provide stability in economic relations and to protect creditors' interests the Georgian law about entrepreneurs is definitely states that the enterprise to which the other enterprise(s) is joined or the enterprise created by uniting of enterprises is a legal successor of the original enterprise/enterprises.[30]The protection of the enterprise's creditors is served by the last sentence of article 14.[4]5of the law about entrepreneurs, according to which for the obligations existed before the division, the enterprises created after the division must have joint obligations. As for the original legal successor it will be defined by the decision about the division.

3. Mergers & Acquisitions (M&A)

In America and generally in the world merging of enterprises and acquisition are very frequent. Development of market economics induces an issue of merging of companies so that they won't cease their existence on free market. There are also often cases when two corporations don't want to merge. In such a case an acquiring company - *Acquirer* is trying to acquire a company to be merged or as it is called *Target* in spite of the latter's consent. There are several types of such acquisition.

When the decision connected with acquisition is approved and confirmed by the directorate of the target company such acquisition is called friendly acquisition, but when the acquiring company is conducting negotiations directly with a stockholder bypassing the directorate of the target company, then such acquisition is called *Hostile Takeover.* It is obvious that in this case the directorate (*board*) is against merging.[31]

From the very beginning hostile takeover, which means the acquisition of the targetcompany bypassing its board, was considered to be violation of business ethics and it was not often used.[32]It is

---

27 "About Entrepreneurs" Georgian law, Article 14.4 (In Georgian).
28 Delaware General Corporation Law, subsection 102 <b><7>,2013-2014 Ed., Lexis Nexis,Delaware, 2013.
29 "About Entrepreneurs" Georgian law, Article 9.6(In Georgian).
30 "About Entrepreneurs" Georgian law, Article $14^{4.}4$, last sentence(In Georgian).
31 *GevurtzA.F.,*Corporation Law, West Group, St.Paul, Minn, 2000, 673.
32 *GevurtzA.F.,*Corporation Law, West Group, St.Paul, Minn, 2000, 673.

true that today an analogous transaction is considered to be an absolutely natural occasion, but in compliance with the accumulated experience there is stated a number of standards which must be observed by stockholders and directors of the enterprises participating in the transaction. Accordingly fight between the companies is interesting from the point of view of legal framework and regulation of these relations.

We must distinguish acquisition from the type of acquisition which is followed by merging. The acquisition of the company can be carried out by acquiring the majority of shares assumed to trading by the target company (acquiring of a control packet of shares/share deal). The acquiring company becomes a majority shareholder of the target company.

It is also possible to merge the target and acquiring companies, after which the shareholder of the acquiring company becomes a majority shareholder of the company generated as a result of merging and will have the opportunity to make important decisions (Merger). A

So acquisition cannot always be followed by merger. It can be possible that the object of the acquiring company will be not merging but merely acquiring of the target company, i.e. one company (it can be physical person) will acquire a control packet of shares of the second (target) company, the target company continues its activities, but the acquiring company has control over the enterprise (Acquisition).

So *Merger* can comprise *Acquisition* while in case of *Acquisition* it is not meant that it comprises *Merger.*

Acquisition of the company can be carried out by purchasing all its assets *(Assets Deal).*

It is clear that when both companies agree on merger, problems are less and there are not many points to be discussed. In such a case the directorate has generally recognized fiduciary duties to the enterprise. It is obliged to serve faithfully to the enterprise, take care of it and act honestly. The board of the both companies is obliged to act considering the best interests of the companies. More interesting is the case when there is no coincidence between the interests of the board and shareholders.

As it was already mentioned in most cases an offer must be approved by the board. It was assumed that the board of the target company would have the right to use protection measures, if it considered that merger or carve-out of control packet was against the interests of the company's shareholders; though modern tendencies of the development of entrepreneurial law show that the board is obliged to consider not only shareholders' interests, but also the interests of the Company itself, Company employees and generally the society where this company is operating.[33]

Moreover the board is authorized not to adopt the decision, which is only within the shareholders' interests, if in case of need it can confirm that the decision was dictated by public interests which deserve stronger protection than the shareholders' interests.[34]

---

[33] *Murray H.J.***,** Choose Your Own Master:Social Enterprise, Certifications,And Benefit Corporations **,**American University Business Law Review, 2012 <http://heinonline.org/HOL/Print?collection=journals&handle=hein.journals/aubulrw2&id=95>

[34] *Murray H. J.***,** Choose Your Own Master:Social Enterprise, Certifications,And Benefit Corporations **,**American University Business Law Review, 2012 <http://heinonline.org/HOL/Print?collection=journals&handle=hein.journals/aubulrw2&id=95>

According Georgian legislation the decision connected with the reorganization of the enterprise is adopted by partners, while according to American legislation the board is actively involved in this process and in a number of cases merger is only carried out after the board's approval. If negotiations concerning merger are done bypassing the board, then it is a case of hostile takeover.

4. Poison Pills and Other Protective Measures Used by the Board

Directors don't act like scientists, lawyers, architects and so on. Their duties mainly imply supervision of business, defining corporation policy and making decision about choosing business transaction which will be more profitable for the enterprise.[35]

In the present chapter there will be discussed more usable protective measures of target enterprises in Delaware State, to what extent is effective and acceptable to give carte blanche to the board to work out protection measures, to use its discretion within the granted authorization.

In Georgia there are no legislative regulations connected with protective measures to be used by a target company, neither in practice nor in decisions of Georgian court analogous issues are considered just for a simple reason that market economics in our country is not so developed as in the USA.

For the last 30 years after achieving independence by Georgia there have hardly ever been carried out any mergers of enterprises in its classical meaning and moreover it isn't worth talking of hostile takeover and the use of protective measures by the board. The only method which the board in Georgia can use against the possible reorganization is assuring, i.e. it must try to assure the company's partners that merger is not the best solution. If the board is able to assure the partners, merger will not be carried out, but if the partners don't change their minds, the board does not have a legal instrument to stand up to this process.

In the USA, particularly in Delaware State, the board is authorized to use protective measures against the hostile takeover. The board decides which type of protective measures to use. In such a case it acts within the granted discretion. In the USA have never been regulations which would prohibit the board from using protective measures.[36]

In Delaware State the target company's board has always acted at its own discretion in working up and using a protective mechanism. Delaware court is discussing the legality of protective tactics proceeding from each concrete case, so there are not existed any stated rules concerning which protective tactics will be considered to be legal and which won't. Court appreciates proportionality and conformity of using protective tactics proceeding from each concrete case.[37]

---

[35] *Hanks, J.Jr.*, Evaluating Recent State Legislation on director and Officer Liability Limitation and Indemnification in: Reprinted from The Business Lawyer Vol. 43, No.4, August 1988, a Publication of the Section of Business Law <Formerly section Section of Corporation, Banking and Business Law> American Bar Association. Copyright 1988, American Bar Association, 1232.

[36] *Stokka S. H.,*Defense Tactics in Hostile Takeovers - An Analysis of The Rule Imposed on the Pursued Target, 2013, 23 <http://home.heinonline.org/>

[37] *Stokka S. H.,*Defense Tactics in Hostile Takeovers - An Analysis of The Rule Imposed on the Pursued Target, 2013, 23. <http://home.heinonline.org/>

One of the protective means is *to initiate tactical litigation*by the board of the target company,[38] also*"Management buy-out" (MBO)*, which implies buying of shares assumed to trading in order to impede the hostile takeover. Redemption of stocks assumed to trading by the company employees and friendly persons in relation to the company is very common, so called *Employee Stock Ownership Plan (ESOP)* against the hostile takeover.[39]The latter is the plan worked out by the board and is very popular because it promotes motivation of the employees.

The target company's board can apply to court and demand to ban the merger by a reason that merger transaction is against antimonopoly law. This protective means will be successful, if court confirms that the acquiring company after merger will gain power and influence on market.[40]

There are a lot of means of protective mechanism, but we won't discuss them in details because of the shortness of the present work volume. So more widely we will talk about the most common and disputable means of protective measures.

On one know case *Unocal Corpovs Mesa Petrolium*[41]court of Delaware stated that the board of the target company is authorized to work out protective tactics in proportion to the actions of the acquiring company, if it has the ground to think that because of not using protective measures target company's legitimate interests will be suffered. Besides the board of the target company must prove the rationality and reasonability of using a concrete protective mechanism.[42]Thisrule of estimation of the board's actions has been firmly established in American corporation law and it is known as "*Unocal Test"*.

*Unocal Test*is important in using such protective measures, as "*Poison Pills"*. It can be said that it is assumed to be the most effective protective measure and accordingly it is used quite often.[43]

Poison Pills- represent convertible stocks issued by company in the name of its stockholders, as dividends. These stocks might not originate the right to vote and get a dividend. It is not their main characteristic feature. Their main feature that turns them into so called poison pills is their conversion right.[44]

If an acquiring company buys a certain amount (stated by the regulations) of the target company's stocks issued for trade and then merges with the target company, the owners of the above mentioned privileged stocks have the right to make profitable conversion of these stocks (exchange) for the acquirer's stocks, which means for example, the target company's one privileged stock will be exchanged for two stocks of the acquiring company (there might be stated the other conversion rule). By this way the acquiring company loses votes in the company originated by reason of merging and it will not have the right to make individual decisions, dismiss the board and etc. Of course using of such

---

38 *Stokka S. H.*, Defense Tactics in Hostile Takeovers - An Analysis of The Rule Imposed on the Pursued Target, 2013, 23. <http://home.heinonline.org/>

39 *Gevurtz A.F.,*Corporation Law, West Group, St.Paul, Minn, 2000, 675.

40 *Clarkson K. W., Miller R. L.,Cross F. B.*, Bunisess Law, Text and Cases , 12thEd., 2012, 802.

41 *Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985)* <http://www.law.illinois.edu/aviram/Unocal.pdf>

42 *Stokka, S. H.*, Defense Tactics in Hostile Takeovers - An Analysis of The Rule Imposed on The Pursued Target, 2013, 24<http://home.heinonline.org/>.

43 *GevurtzA.F.,*Corporation Law, West Group, St.Paul, Minn, 2000, 675.

44 *GevurtzA.F.,*Corporation Law, West Group, St.Paul, Minn, 2000, 675.

a mechanism is an obstacle for the acquiring company, it is impeding the acquirer's process of hostile takeover.[45]

In answer to "poison pills" a stockholder of the company wanting the hostile takeover might contact some stockholder of the target company who is loyal to the merger and assure him/her to change the existed board for desirable candidates; it will enable the hostile takeover wisher to exclude the use of poison pills, though it is not easy, when along with the rule "poison pills" there is *staggered board provision.*[46]

Staggered board provision implies that even the assurance of the stockholder might be achieved, if directors of the board are chosen in such a way that their terms of office expires at different time, in this case the board can't be dismissed in one year, because the authorization term of each of them will be expired a year later (sometimes 1/3 of the board is chosen by this rule, i.e. at any concrete date the authorization term expires for 1/3 of the board and not for the whole board[47]). Consequently it will take at least 3 years to change the board completely, but postponement of merging is not the acquiring company's interest.

In hearing air-gas case *Air Products and Chemicals Inc v Airgas Inc*[48]Delaware court confirmed that "poison pills" can be used by the registered companies in Delaware. The court emphasized again the importance of the so called *Unocal Test*and remarked that requirements of the mentioned test must be observed.[49]

In spite of the above mentioned decision a number of skeptical persons towards the "poison pills", as to the protective measure, is increasing, according to statistics the number of the registered enterprises using this protective measure is getting less. However in Great Britain and European Union [50]the usage of thisprotective measure is prohibited.[51]

How will the questions connected with the hostile takeover be balanced? It depends on how the conflict of interests, which might exist between the shareholder and the Board, will be balanced. Great Britain legislation is friendly to shareholders, as the Board does not have the right to oppose the merger offer, if a shareholder expresses readiness for it.[52]Accordingly there is in practice a *board neutrality rule.*

---

45 There are different kinds of using "*Poison Pills*", which are called: *Flip-over, Flip-in, Back-end*, and etc, in this case the usage of "*Poison Pills"*is discussed for the case of Flip-over. The discussion of them completely is impossible because of the Article format.

46 *Stokka, S. H.*, Defense Tactics in Hostile Takeovers - An Analysis of The Rule Imposed on The Pursued Target, 2013, 24<http://home.heinonline.org/>.

47 *Zwecker A.,* The EU Takeover Directive:Eight Years Later, Implementation But Still No Harmonization Among Member States on Acceptable Takeover Defenses , 2012, 239.

48 *Air Products and Chemicals Inc v Airgas Inc, C.A. Nos. 5249, 5256*<Del. Ch. Feb. 15, 2011>. <http://courts.delaware.gov/opinions/download.aspx?ID=150850>

49 *Stokka S. H.*,Defense Tactics in Hostile Takeovers - An Analysis of The Rule Imposed on The Pursued Target, 2013, 25 <http://home.heinonline.org/>.

50 Directive 2004/25/EC of The European Parliament and of the Council of 21 April 2004 on Takeover Bids, <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:142:0012:0012:EN:PDF>.

51 *Stokka, S. H.*, Defense Tactics in Hostile Takeovers - An Analysis of The Rule Imposed on The Pursued Target, 2013, 25. <http://home.heinonline.org/>.

52 *Stokka, S. H.*, Defense Tactics in Hostile Takeovers - An Analysis of The Rule Imposed on The Pursued Target, 2013, 25<http://home.heinonline.org/>.

There is a dispute about which approach is better: to be friendly to the shareholder, which prohibits the board to act against merging without the consent of the shareholder (*board neutrality rule)*or to be friendly to the board and there has not been an unambiguous answer yet.

If we admit that the role of the target company's board is only to increase the shareholders' wealth, it means that the board is passive, but if we admit that the board must also consider the interests of other persons connected with the company (company employees, creditors, customers), then the board will be active.[53]

Supporters of the board neutrality rule think that giving freedom to the director is dangerous, because as a rule after merging the board is dismissed, the director might act at his/her own discretion and will not foresee the interests of the shareholders and the company and might oppose the offer of merging, even it will be profitable for the company.

On the other hand the board runs the enterprise's everyday activities and it knows better what is good and what is bad for its enterprise. So the shareholder might be wrong easily, because he/she does not have the complete information and is not obliged either to know everything about the business activity of the enterprise. Hence it will be better if the board can stand up to the offer about merging despite the shareholder's position.

Protection guarantee of minority shareholder is under question in case when the decision is only adopted by the majority shareholder. The board is obliged to protect rights of all shareholders equally, when the shareholder has the right to sell his/her own shares at acceptable price and at the same time he/she is not obliged to take care of the other shareholder and help him/her in carve-out of shares.[54]

If the board is prohibited to use protective measures, the acquirer will achieve success easily and merging of companies will help them with strengthening and their share in market economics will be increased. This argument talks of as if in favor of the supporters of *board neutrality rule,* but as it was shown by researches the use of protective mechanisms in conditions of the hostile takeover is causing the growth of the value of the target company, which finally will be reflected positively on the target company's shareholders. The experience of Delaware State shows that granting discretion to the board is much more effective than the existence of *board neutrality rule.*[55]

After comparing it can be said that the law about entrepreneurs is friendly to shareholders, as according to the law the decision connected with the reorganization of the enterprise is adopted by partners.[56]Accordingly Georgian legislation shares the principle of *board neutrality rule.*

At first sight according to Georgian legislation the board performs technical function, is sending a proper message, is holding a partners' meeting and etc.

It's true that shareholders are adopting a decision about the reorganization of the enterprise, but it is clear that for adopting such an important decision they must have the complete and authentic information, in order not to make mistake on adopting the decision.

---

53 *Palmiter A. R.,*Corporations, 5thEd., Aspen Publishers, New York, 2006, 652-653.

54 *Gevurtz A.F.,*Corporation Law, West Group, St.Paul, Minn, 2000, 631.

55 *Stokka S. H.*, Defense Tactics in Hostile Takeovers - An Analysis of The Rule Imposed on The Pursued Target, 2013, 26 <http://home.heinonline.org/>.

56 Georgian law "About Entrepreneurs", Article14[4] (In Georgian).

The information and the project about merging or division must be prepared by the board of directors. In this case towards directors will be spread article 9.6 of the law about entrepreneurs, according to which directors and members of the supervising committee must run society's affairs honestly and care for the company so as a sensible person at the analogous position and in the analogous conditions does. The leaders of the enterprise must be acting in the belief that their actions are the most profitable for the society. If directors violate this duty they will answer before the society jointly with all their property straight and directly.

To what extent is fair to set analogous responsibility on directors when they don't have chance to oppose the offer of merging? Namely, it is interesting will the board be held accountable, if it was trying to reassure the partners, but was not able to. As it was mentioned above the board fulfils the shareholders' decision, signs the agreement about merging and etc. How must the board of the Georgian company behave, if it is against the reorganization? Does it have a real instrument to stand up to such a transaction? Or will the director be held accountable according to the note of article 9.6 of the law about entrepreneurs which does not release the director from responsibility even he/she is acting to perform the partners' decision.

The law about entrepreneurs does not give exhaustive answers to these questions. On this basis we can conclude that Georgian corporation law has a deficit of such effective mechanisms, which promote fast and effective usage of law standards in everyday business life.

Unfortunately this situation is not put right by court practice either, while in Delaware State courts represent important institutions, which promote fulfillment of corporation law standards and to establish and develop new, modern regulations of corporation management.

To remark only that the law is defective and needs to be changed can't give relief to the directors. For them it is important how to behave under the conditions of the existed law so that to escape responsibility. The only possible way for the director is to write a refusal of participating in this transaction and give the explanation of his refusal; though for such an action he might lose his job. A

He has to make a choice: either to take this step or despite his inner belief to be involved in the fulfillment of the decision about merging, which later might cause his personal responsibility.

From all the mentioned above it must be said that this honestly acting board is much more competent compared to the partners' meeting, in connection with the offer of merging the board believes frankly that it is acting in the interests of the enterprise to make decision within the granted discretion. In the process of merging of enterprises the law "About Entrepreneurs" on the one hand does not exclude the responsibility of the director in case of his acting in compliance with the shareholders' decision, on the other hand it does not grant the director responsibility to influence on this decision. So it is required to make amendments to the law according to which the board of directors will be granted the responsibility to stand up to the offer of merging on the basis of the company's interests in spite of the shareholders' position.

As for danger of putting forward own interests, the law must foresee Unocal Principle, according to which the board must take burden of proving about the proportionality of using protective mechanisms. At the same time unique and unambiguous indication must be made that in relation of the board's decision there is in force discretion of entrepreneurial decisions - *Business Judgment Rule.*If the director violates *Duty of Loyalty*and *Duty of Care*in relation to the enterprise he will have

to answer for the damage and he won't be able to defend himself with indicating the *Business Judgment Rule*.

5. Business Judgment Rule- as Standard in Estimating the Adequacy of Protective Measure

Enterprise leaders are expected to take proper care in relation to the company and to act considering the company's best interests, but of course it is clear that they are not the guarantee of business success.

The fate of the enterprise –it will be profitable or not – mostly depends on capability and skills, experience and means of the director. At the same time the director answers for consequences in relation to the enterprise.[57]

*Business Judgment Rule*by its contents consolidates the right of the director (board of directors) to take a decision from several possible ones honestly, considering the best interests of the enterprise and the shareholders. At the same time he must frankly believe that this decision complies with the best interests of the enterprise and the shareholders, i.e. *Business Judgment Rule*states a legislative framework within which the directorate has freedom to act. If the director is honest in taking a decision, there won't be his accountability before the company and shareholders because of a mistaken and unsuccessful business decision. Correspondingly the decision is not subjected to be revised by the shareholders or other persons.[58]

*Business Judgment Rule*institute is an offspring of American court practice and today it plays an important role in in the enterprise management. Judging from its contents in relation to the actions carried out by the director it can be called "presumption of innocence".

It protects the director from accountability, if his action satisfies reasonableness requirements.[59]

Directorate will be protected by the *Business Judgment Rule,* if there are the following preconditions:

1. Directorate has used all the possible means to get the information;
2. Director has a reasonable ground for taking a decision;
3. There is no interests' conflict between the director's personal and the company's interests.[60]

Business Judgment Rule(discretion of the entrepreneurial decision) gives the director freedom to take decision within the framework stated by legislation. Court won't judge to what extent is relevant the entrepreneurial decision taken by the director, if there is no ground to have any suspicion about honesty and rationality of the director.[61]

In American practice the *Business Judgment Rule*has the presumption nature of protection of enterprise leaders, which must be "overcome" by a complainant, which means that the complainant

---

[57] *Chanturia L., Ninidze T.,*Commentary to the Law about Entrepreneurs, III Ed., Tb., 2002, 115 (In Georgian).
[58] *Clarkson K. W., Miller R. L.,Cross F. B*., Business Law, Text and Cases, 12thEd., 2012, 779 (In Georgian).
[59] *Djugeli G.,* Protection of the capital in JSC, 2010, Tb., 185(In Georgian).
[60] *Clarkson K. W., Miller R. L.,Cross, F. B*., Bunisess Law, Text and Cases, 12thEd., 2012, 779.
[61] *Clarkson K. W., Miller R. L.,Cross, F. B*., Bunisess Law, Text and Cases, 12thEd., 2012, 779.

must ground reliably the fact of violation of the fiduciary duty of care by the director that the director was not acting honestly. Court will begin consideration only when the complainant is able to confirm all these. In this case the burden of proof will be on the director and then he will be already obliged to give grounds that he was acting on the basis of the interests of the enterprise.

Only for a reason that director's decision turned out to be harmful for the enterprise, a question of accountability of director will not be arisen, if it is confirmed that in taking the decision director was acting honestly within his/her authorization, which is one of the positive features of the *Business Judgment Rule*.

"To allege that a corporation hassuffered a loss as a result of a lawful transaction, within the corporation's powers, authorized by a corporatefiduciary acting in a good faith pursuit of corporate purposes, does not state a claim for relief against that fiduciaryno matter how foolish the investment may appear *post factumum"* by American court practice was recognized as inadmissible strictness towards director to demand unmistakable actions from him.[62]

Supreme Court of Delaware in connection with case *In Revlon, Inc. v MacAndrews & Forbes Holdings, Inc* explained that director won't be able to point out the *Business Judgment Rule,* if he/she is only acting in order to maintain personal authority. If director wants to be under protection by the *Business Judgment Rule,* he/she must confirm that the used protective measure was in proportion with the danger directed to the corporation policy and effectiveness.[63]In the same court decision it was said that if selling of the company is inevitable and there are several clients willing to buy it, the role of the target company's directorate is to hold a "profitable auction" between the clients in order to raise the company's price.[64]

In carving-out the control packet of shares the directorate is obliged to confirm that its action was reasonable in relation to the selling process itself, as well as to the price[65], in such a case the directorate will be able to be protected by the *Business Judgment Rule.*

According to the Georgian law about entrepreneurs directors and members of the supervising committee must conduct the company's activities honestly and care for the company so as an ordinary, sensible person at the analogous position and in the analogous conditions does. The leaders of the enterprise must be acting in the belief that their actions are the most profitable for the society.[66]

If they violate this duty, for the harm arisen before the company they will have to answer before the society jointly with all their property straight and directly.

---

62 *Gagliardi v. TriFoods Intern., Inc*., 683 A.2d 1049, 1051. <Del. Ch., 1996>: "to allege that a corporation has suffered a loss as a result of a lawful transaction, within the corporation's powers, authorized by a corporate fiduciary acting in a good faith pursuit of corporate purposes, does not state a claim for relief against that fiduciary no matter how foolish the investment may appear in retrospect"; see also: *Cinerama, Inc. v. Technicolor,* Inc., 1991 WL 111134, at *15 <Del. Ch., 1991> –Referred to *Djugeli G.,* Protection of the capital in JSC, 2010, Tb., 87(In Georgian).

63 *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173*<Del.,1986> <http://www.law.illinois.edu/aviram/revlon.pdf>.

64 *Zwecker A.,* The EU Takeover Directive:Eight Years Later, Implementation But Still No Harmonization Among Member States on Acceptable Takeover Defenses , 2012, 240-241. <http://home.heinonline.org/>

65 *Zwecker A.*, The EU Takeover Directive:Eight Years Later, Implementation But Still No Harmonization Among Member States on Acceptable Takeover Defenses , 2012, 241 <http://home.heinonline.org/>.

66 Georgian law "About Entrepreneurs", Article9.6(In Georgian).

If compensation is compulsory, the duties of corporation's leaders are not ceased, because they were acting to perform partners' decisions.[67]

Georgian legislation and court practice don't know discretion of the entrepreneurial decision *Business Judgment Rule*, though on the basis of the pointed standards it is clear that in making decision Georgian law about entrepreneurs sets a certain standard and does not demand from director making absolutely unmistakable decisions. The main thing is that the decision must be made by director reasonably in a good faith.

The reason of critique of this institute is that there is not defined the reasonableness boundary, there are no concrete principles to be observed by director in making decision in order to be protected by this rule. Court must try and assess each concrete case independently. From this point of view court practice of Delaware is very rich and flexible. Protection of directors' rights most of all are guaranteed here.[68]

Court of Appeal of Delaware on one of the world-known cases *Paramount case*clarified: "In ordinary situation neither court nor shareholders have the right to intervene in the decision-making process".[69]

Considering that as a result of the reforms carried out in Georgia director's role in the enterprise management is increased, it becomes compulsory that director must feel protected and not think that he will be punished for making an "unprofitable" decision, if this decision was made in a good faith basing on the assessment of facts and in the belief that it was the best for the enterprise.

In case of argument Georgian court must foresee experience and practices existed in Delaware State and charge a plaintiff with a burden of overcoming *Business Judgment Rule.* as director runs the business on the basis of personal responsibility and the liberty principle of making decision[70], and the violation of this rule will lessen the director's will to take a certain risk in order to bring success to the enterprise.

6. Conclusion

Considering the format of the present article of course it will not give a perfect and exhaustive picture about directors' duties in merging and acquisition processes of enterprises, though certain conclusions can be made.

As it was mentioned above in the work is mainly emphasized on acquiring a control packet of shares (*Acquisition)* and acquisition which is followed by merger (*Merger)*.

The directorate of a target company resists the offer of merging. On the one hand directors have their own interests to maintain position and control over the enterprise, on the other hand they have

---

67 Georgian law "About Entrepreneurs", Article9.6(In Georgian).

68 *Hamilton R. W.,* The law of Corporations, 5thEd., St. Paul , 2000, 461.

69 *Paramount Communications, Inc. v. QVC Network,*637 A.2d 34, February 04, 1994 .<http://international.westlaw.com/find/default.wl?sp=intbucrs000&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLIN11.04&cite=637+A.2d+34&fn=_top&mt=114&vr=2.0&findjuris=00001>.

70 *Lazarashvili L.***,** Theoretical and Practical Issues of the Modern Corporation Law, Office Agreement with Enterprise Director, Partner and Director in Internal Public Relations, 2009, 339(In Georgian).

fiduciary duty in relation to the enterprise and shareholders to act in a good faith and in the belief that they are acting in compliance with the best interests of the company.[71] M

Sometimes taking care of the enterprise by directors is caused by their personal interests; in such a case a shareholder (partner) which could have had a profit in a result of merging, has the right to commence a legal action in court against directors and to allege that the usage of a protective measure by directors was not reasonable in this concrete case and that directors violated fiduciary Duty *of Care* and *Duty of Loyalty.* In such a case court is using *Business Judgment Rule*to state to what extent was reasonable the directorate's action.[72]If director comes to be under the *Business Judgment Rule*[73], then the case will be dismissed and director will not be responsible only because *post factu m*decision did not turn out to be profitable.

In Delaware State directors have more discretion than in Georgia, though this discretion might cause rather a big risk of making them answer for. American directorate in many cases is authorized to resist merging offer, while in Georgia directorate have not a legislative ground for it.

Board has authority as of a supervising committee, as well as of a directorate, which turns it into the strongest and the most influential body of the corporation.[74]

The only means of resisting reorganization of the enterprise for the Georgian company's directorate is persuasion of shareholders instead of the above mentioned protective measures.

In the USA directorate has authority. It can use protective measures at its sole discretion. The main thing is it must act within fiduciary duties.[75]

Director is obliged to act within his own authority, *Duty to act within Authority,* otherwise he will be made answer for[76].

Directors in relation to the enterprise have *Duty of Loyalty*and *Duty of Care,*each of them states a general standard of director's action.[77]Director's action standards are different depending on a concrete matter. For example, in case of merging directorate's action must be relevant to a higher standard of care and loyalty, than in case of taking ordinary daily decisions.

Similar obligations of directors are also foreseen by the Georgian law about entrepreneurs, though Georgian legislation needs refinement and improvement in this direction.

According to the established practice in Georgia directors must perform instructions of shareholders and members of the supervising committee; otherwise they will lose a job.[78]The mentioned practice of course does not correspond to the note of the Georgian law about entrepreneurs,

---

71 *Clarkson K. W., Miller R. L.,Cross F.B.*, Business Law, Text and Cases , 12thEd., 2012, p 801-802.

72 *Clarkson K. W., Miller R. L., Cross F. B.*, Business Law, Text and Cases , 12thEd., 2012, 801-802.

73 See Chapter 5.

74 *Chanturia L.,* Corporation Management and Leaders Responsibility in Corporation Law, Tb.,2006, 113 (In Georgian).

75 *Zwecker A.,* The EU Takeover Directive: Eight Years Later, Implementation But Still No Harmonization Among Member States on Acceptable Takeover Defenses , 2012, 260 <http://home.heinonline.org/>.

76 *KleinbergerD. S.***,** Agency, Partnerships and LLCs, 2nd Ed., Aspen Publishers, New York, 123.

77 *PalmiterA. R.,*Corporations, 5thEd., Aspen Publishers, New York , 193.

78 See: The decision of Georgian Supreme Courtdecreeof June, 26, 2003 <case #as 68-767-03>.The Supreme Court returned the case for retrial. The case was about dismissing the director and the reason was conflict between the director and shareholders.

according to which the obligations of the company's leaders are not ceased by the reason that they were acting to perform partners' decisions.[79]

The role and accordingly the responsibility of directorate are very big. So putting a manager in charge of an enterprise choice must be made on a qualified, skilled, experienced person, capable to achieve the objective and this issue must not be solved by personal acquaintance.

It's true that the law about entrepreneurs is aware of directors' responsibility and charges them with certain duties in relation to the company, but the law only concerns these issues in general. On conditions that court practice does not exist either, a lot of questions are arisen which are actually impossible to be answered unambiguously.

Practical lawyers and company directors have to find way in very obscure conditions. It's very hard to give practical advice to persons involved in business, because the law, as it was already mentioned, is not clear and neither court practice gives an answer to these obscure notes of the law.

Business development and stimulation of investors in the country must just be started by putting legislation in compliance with the international standards. From this point of view especially important is the law about entrepreneurs, because it regulates formation, management and reorganization of enterprises, rights and obligations of their leaders.

Taking into account the entire mentioned above Professor LadoChanturia's consideration about the necessity of working out a new law still maintains its actuality.

"So many unsystematic and hard-to-explain changes entered into the law about entrepreneurs for years that the necessity of working out a new law has been on agenda for a long time."[80]

[79] "Georgian law "About Entrepreneurs", Article9.6 (In Georgian).

[80] *Chanturia L.,*Private Society of Europe – Novelty in European Corporation Law, Journal of Law #1, 2009, 41(In Georgian).